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No. 06-405

In The Supreme Court of the United States

JAMES RAY,

Petitioner,

v.

CSX TRANSPORTATION, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR REHEARING

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COMES NOW the petitioner, James Ray, through counsel, pursuant to Rule 44 of the Rules of the Supreme Court of the United States, and respectfully requests that this Court rehear his Petition for Writ of Certiorari which was denied by this Court by Order entered November 27, 2006. As grounds for rehearing, petitioner asserts that there are intervening circumstances of a substantial or controlling effect, and in support thereof, states as follows:

On September 18, 2006, petitioner filed a Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit with this Court. One of the questions presented in the petition was as follows:

1) Whether the Fourth Circuit applied the incorrect standard to determine who could be a relevant "decisionmaker" and agent for the defendant employer in a suit under Title VII of the Civil Rights Act of 1964 for wrongful termination in the context of discriminatory enforcement of disciplinary procedures, where the Circuit Courts have articulated different tests and the Fourth Circuit test essentially precludes corporate liability where the corporation presents a discriminatory, disciplinary record against the employee but there is not substantial evidence of discriminatory intent by the person making the ultimate, termination decision?

This Court denied the Petition for Writ of Certiorari by Order entered November 27, 2006.

There are currently two cases pending before this Court on Petition for Writ of Certiorari which present the same issue as that presented in this case. These cases are *Marianne Sawicki v. Morgan State University and State of Maryland*, No. 06-306,[1] and *BCI Coca-Cola Bottling Company of Los Angeles v. Equal Employment Opportunity*

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1. The question presented in *Sawicki* is: "Under Title VII of the 1964 Civil Rights Act, if an employee is dismissed or otherwise injured as a result of the intentionally discriminatory actions of an official who exerted substantial influence over the employment decision involved, may the employer avoid liability by showing that a different official was the ultimate decisionmaker?"

Commission, No. 06-341.[2] Both of these cases have been distributed for consideration by the Court at the conference on January 5, 2007.

The *Sawicki* case arises out of the Fourth Circuit, as does this case, and the *BCI Coca-Cola Bottling Company* case arises out of the Tenth Circuit. All of these cases involve the relevant decisionmaker standard under Title VII, and, and the way in which a discriminatory lower ranking supervisor can cause his supervisors to dismiss an employee. The Solicitor General has noted in the government's brief in *BCI Coca-Cola* that there is a split in the circuits regarding this issue.

If this Court should grant the Petition for Certiorari in either of these two cases, *Sawicki* or *BCI Coca-Cola Bottling Company*, then the final decision of this Court on the merits could impact employees, such as Mr. Ray, who were terminated by a decisionmaker who was influenced by lower level employees who displayed discriminatory animus towards the employee. If the decision of this Court on one of these cases should be favorable to the petitioner, and Mr. Ray is not granted a rehearing, then he will not receive the benefit of this Court's resolution of the decisionmaker issue.

If this Court grants certiorari in either *Sawicki* or *BCI Coca-Cola Bottling Company*, this Court should defer action on the instant petition for rehearing pending the final

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[2] The question presented in *BCI Coca-Cola Bottling Company* is: "Whether, and in what circumstances, an employer can be liable for racial discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000 *e et seq.*, based on the alleged bias of a subordinate employee, where the subordinate employee did not take the adverse employment action himself but did influence the decision?"

decision in the case in which review is granted.

WHEREFORE, petitioner respectfully requests that this Court defer action on the Petition for Rehearing pending a decision on these two cases.

Respectfully submitted this 22ND day of December, 2006.

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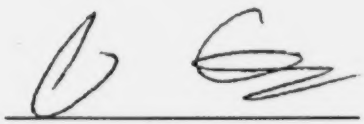
CERTIFICATION PURSUANT TO SUPREME COURT RULE 44(b)

I hereby certify that this Petition for Rehearing is restricted to the grounds specified in Rule 44 of the Rules of the United States Supreme Court. Specifically, the ground for rehearing in this matter is that there are intervening circumstances of a substantial or controlling effect. Furthermore, this Petition for Rehearing is presented in good faith and not for delay.



John P. Fishwick, Jr.